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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Artistic Studios Limited, LLC

Serial No. 78139229

Varen Craig Belair of Patton Boggs LLP for Artistic Studios Limited, LLC.

Rebecca A. Smith, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Quinn, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Artistic Studios Limited, LLC seeks registration on the Principal Register of the mark ARTISTIC STUDIOS LIMITED for goods identified in the application, as amended, as follows:

"Stationery goods, namely, greeting cards, calendars, boxed notes, writing pads, note pads, stencils, posters, children's activity books, paper invitations, photo albums, keepsake boxes, Christmas cards, paper party favors and wrapping paper," in International Class 16.¹

¹ Application Serial No. 78139229 was filed on June 26, 2002 based upon applicant's allegation of use of the mark in commerce since at least as early as December 1998.

This case is now before the Board on appeal from the final refusals of the Trademark Examining Attorney to register this mark based upon two statutory grounds.

Under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), the Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified goods, so resembles two marks owned by two different entities as to be likely to cause confusion, to cause mistake or to deceive.

The first cited mark is of the words ARTISTIC GREETINGS for goods identified as follows:

"Name and address labels; label dispensers for office use, stationery and household use; miscellaneous self-stick labels; occasion cards; name cards; note paper; note paper holders and note pads; personal and business stationery; magnetic-backed stationery; stampers with self-inking stamp pads; gift wrapping ribbon; calendars; sketch sheets; wrapping paper; pencils; pencils with cases; pencils in a bag; ink refills for self-inking stamp pads; plates for embossing; hand held embossers; and stationery and gift catalogs," in International Class 16;²

and a second cited mark is of the word ARTISTIC for goods identified as follows:

"photograph albums, photograph storage boxes and photograph collection boxes made of

² Reg. No. 2515178 issued to Artistic Greetings Incorporated on December 4, 2001.

paper and/or cardboard, scrapbooks, photographic mounting paper, photograph and page protectors, drawing templates, stencil and die-cut shapes made of cardboard for tracing designs," in International Class 16.³

The second basis for refusal is that applicant has failed to comply with the requirement that the words "Studios Limited" must be disclaimed apart from the mark as shown, pursuant to Section 6 of the Trademark Act, 15 U.S.C. §1056.

The Trademark Examining Attorney and applicant have fully briefed the case. Applicant did not request an oral hearing before the Board.

We affirm both refusals to register.

In arguing for registrability, applicant contends that applicant's mark is not confusingly similar to the cited marks when the respective marks are considered in their entirety; that the term "Artistic" is relatively weak in this field; that the addition of the words "Studios" and "Limited" eliminates any likelihood of confusion with the cited marks; that more than five years of contemporaneous usage have passed without a single incident of actual confusion; and that the phrase "Studios Limited,"

³ Reg. No. 2287965 issued to Deluxe Craft Manufacturing Co. on October 19, 1999.

containing the dominant word "Studios," adds distinguishing matter to this mark.

By contrast, the Trademark Examining Attorney argues that applicant's mark is highly similar to the cited marks; that the word "Artistic" is the dominant portion of all the marks; that the goods and trade channels are closely related, if not identical; and that inasmuch as applicant is an art studio producing limited edition stationery and related products, the words "Studios Limited" are descriptive of applicant's goods.

We turn first to the refusal of the Trademark Examining Attorney to register this mark based upon the Office's requirement that applicant disclaim the words "Studios Limited" apart from the mark as shown.

In her appeal brief, the Trademark Examining Attorney argues as follows:

"... Consumers will encounter the term STUDIOS in connection with the goods and will understand the applicant to be referring to the applicant company as an art studio that produces various stationery goods. There is likely to be little doubt in this context that consumers will view the term STUDIOS as simply describing what the applicant company does and will not view this as a trademark."

Applicant argues that the term "Artistic" is weak in light of multiple registrations containing the word

"Artistic" for listed goods classified in International Class 16, that the word "Artistic" modifies the word "Studios," and that the word "Studios" is actually less descriptive of its listed goods than is the word "Artistic."

In response, the Trademark Examining Attorney argues that the combined phrase, "Studios Limited," is synonymous with "company" when used in conjunction with applicant's listed goods.

In support of this conclusion, the Trademark Examining Attorney has demonstrated that a studio is synonymous with a business establishment, and as corroboration, has placed into the record a number of third-party registrations where the word "Studios" is disclaimed for photo albums, printed matter, stationery items, etc.

The Trademark Examining Attorney has also explained the merely descriptive nature of the word "Limited" as variously referring to the fact that applicant is a "*Limited Liability Company*" or that "the goods are produced in *limited* editions ...," (Examining Attorney's appeal brief, p. 8), and has placed into the record a number of registrations where the word "Limited" is disclaimed for photo albums, printed matter, stationery items, etc.

Irrespective of which connotation of the word "Limited" one may find most likely, we find that each of these words alone ("Studios" and "Limited") readily conveys information about a feature of the applicant's goods, and that according to Office practice, each of these terms has routinely been disclaimed for the goods identified by applicant. In its combined form ("Studios Limited"), when viewed in the context of these goods, the new term does not take on a novel meaning that would create an arbitrary or suggestive term. Hence, we agree with the Trademark Examining Attorney that these words are merely descriptive and should be disclaimed.

We turn next to the issue of likelihood of confusion. Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing upon the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the relatedness of the goods as described in the application and the cited registrations, applicant's listing of goods is identical or closely related to the goods in the cited registrations. For example, applicant's identification of goods, like Artistic Greetings Incorporated's identification of goods, includes a variety of stationery items, such as greeting or occasion cards, calendars, note pads and wrapping paper. Like Deluxe Craft Manufacturing Co.'s identification of goods, applicant lists stencils, photo albums and storage boxes. Hence, applicant has listed goods identical to those identified in both of the cited registrations. Additionally, applicant's posters, children's activity books, paper invitations, party favors, etc., are clearly related to the respective registrants' sketch sheets, scrapbooks, hand-held embossers, drawing templates, tracing aids, etc.

Moreover, turning to the related du Pont factor dealing with the similarity or dissimilarity of established, likely-to-continue trade channels, given that neither applicant nor either of the registrants has placed any restrictions on their respective channels of trade, we must presume that applicant's goods and registrants' goods

will all move through the normal channels of trade to the usual consumers of goods of the type identified. See Canadian Imperial Bank of Commerce, National Association v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Clearly, identical goods must be presumed to be purchased by the same classes of consumers.

Similarly, we should also note that as to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, these goods are relatively inexpensive products and would not be subjected to the careful scrutiny that would accompany more expensive items.

Turning to a consideration of the similarities / dissimilarities in the marks, we note at the outset that if the goods are identical, as is the case herein, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). We agree with the Trademark Examining Attorney that the applicant's mark is highly similar to each of the cited marks. The word "Artistic" is the whole of Deluxe Craft Manufacturing Co.'s mark, and the dominant term in both Artistic Greetings Incorporated's and applicant's respective marks. Despite the fact that the word "Artistic" may be suggestive of

stationery, greeting cards and craft items, even suggestive marks are entitled to protection against registration of a substantially similar mark used in connection with identical, or even closely-related, goods. See In re Textron Inc., 180 USPQ 341 (TTAB 1973).

As to the appearances and sounds of the marks, applicant has taken the entirety of Deluxe Craft Manufacturing Co.'s ARTISTIC mark and added subordinate matter thereto. Similarly, as noted above, the word "Artistic" comprises a significant portion of Artistic Greetings Incorporated's ARTISTIC GREETINGS mark.

As to the connotation of the marks, the words "Studios Limited" in applicant's mark follows the leading word, "Artistic," and, as discussed above, are merely descriptive of applicant's goods. In comparing the respective marks, we do not disregard any portion of the composite marks, but compare the marks in their entireties. Nonetheless, the Court of Appeals for the Federal Circuit has held that in articulating reasons for reaching a conclusion on the question of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature or portion of a mark. That is, one feature of a mark may have

more significance than another. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987), and In re National Data Corporation, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

In this vein, the Trademark Examining Attorney argues that inasmuch as the words "Studios Limited" in applicant's mark are merely descriptive and hence must be disclaimed, one should accord little weight to this combined term as distinguishing applicant's mark from the cited marks. All of the involved marks have the same basic connotation of products that consumers would want to purchase because of their appealing nature, creativity or imagination. The identical word "Artistic" is the same literal element that would be used to call for all of these goods. Applicant's addition of the words "Studios Limited" to Deluxe Craft Manufacturing Co.'s mark, or replacing Artistic Greetings Incorporated's generic word "Greetings," with the words "Studios Limited" does not alter the connotation. Applicant's composite mark suggests an art studio producing creative products. The connotation of applicant's mark helps to create the same overall commercial impression that one draws from each of the cited marks.

Accordingly, having reviewed the similarities in sight, sound and meaning between applicant's mark and each of the cited marks, we find that applicant's mark creates the same overall commercial impression as each of the cited marks.

As to the du Pont factor focusing on the number and nature of similar marks in use on similar goods, applicant cites to "... the proliferation of marks and names which include ARTISTIC, for goods in International Class 16 ..." as evidence that registrants' marks are entitled to a narrow scope of protection. Acknowledging earlier that the word "Artistic" may be suggestive of applicant's goods, we merely find corroboration of this conclusion in the third-party registrations placed into the record by applicant. Moreover, applicant's argument about the alleged weakness of the cited marks is not persuasive considering that third-party registrations are not evidence of use of the marks or that the public is familiar with them. Furthermore, some of the third-party marks referenced by applicant are for goods or services with no commercial relationship to registrants' goods, e.g., pottery, bank checks, restaurant guides, etc.

We turn next to the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion. Applicant argues that in considering the du Pont factors in this case, we should consider that applicant has used its mark since December 1998 without confusion or comments from either owner of the cited marks.

However, the record contains no evidence that these respective marks have been used contemporaneously on these respective stationery and photographic items in the same geographical area. The absence of any instances of actual confusion can be a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or all affected trademark owners. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). Such evidence is not a part of this record. Furthermore, we have not had opportunity to hear from the registrants on this point. Moreover, as noted by our principal reviewing court, the Court of Appeals for the Federal Circuit:

With regard to the seventh du Pont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, J.C. Hall Co. v. Hallmark Cards, Inc., 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context.

In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). Therefore, applicant's claim that no instances of actual confusion have been brought to its attention is not indicative of an absence of a likelihood of confusion, and we find that this factor favors neither the position taken by applicant nor that of the Trademark Examining Attorney.

In conclusion, given that the goods herein are identical in part and otherwise closely related to the goods in each of the cited registrations, that the goods are inexpensive items that will presumably move through the same channels of trade to the same classes of consumers, that applicant's mark creates the same overall commercial impression as do the cited marks, and that this record does

not support the conclusion that the cited marks are weak as applied to registrants' listed goods, we conclude that applicant's mark, when used in connection with its identified goods, so resembles the two cited, registered marks as to be likely to cause confusion, to cause mistake or to deceive.

Decision: The refusals to register, based upon applicant's failure to comply with the requirement to disclaim the words "Studios Limited" apart from the mark as shown, and based upon a likelihood of confusion with two cited registrations, are hereby both affirmed.

If applicant intends to appeal the affirmance of the Section 2(d) refusal, and it is willing to disclaim the words "Studios Limited" apart from the mark as shown, then applicant may file the disclaimer within thirty days of the date of this decision. Trademark Rule 2.142(g). In the event that the disclaimer is filed, the refusal of registration based on the disclaimer requirement will be set aside.

Applicant should note, however, that the filing of the disclaimer would not extend the time to file an appeal of

this decision. The time for filing an appeal of this decision runs from the mailing date hereof.